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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 478

BESS KAYE,

Appellant,

v.

SPENCE-CHAPIN ADOPTION SERVICE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEE TO DISMISS APPEAL

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Motion to Dismiss

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that appellant's appeal from the order of the Court of Appeals of the State of New York be dismissed on the ground that it does not present a substantial federal question for review within the jurisdiction of this Court.

Jurisdiction

Appellant claims that jurisdiction of this appeal rests on 28 U.S.C. §1257(2) and (3). Appellee will show that the requirements of 28 U.S.C. §1257(2) have not been complied with. 28 U.S.C. §1257(3) is not here relevant as it relates solely to review by writ of certiorari.

Questions Presented

It is respectfully submitted that there is no substantial question presented for review by the Court in this case.

Statement of the Case

Reduced to its simplest terms, this case involves the placement of a child with a private, non-sectarian adoption agency by both of the natural parents over the objections of appellant, the child's maternal grandmother. The litigation has consisted of attempts by the grandmother to have the natural parents' wishes thwarted and to have the child placed with her.

Appellant's daughter, one Karen Kaye, married one Neil Mulhall. A daughter, Heather Mulhall, was born of the marriage on January 24, 1958 (fols. 22-23). After certain marital difficulties, the parents separated. For a short period while the mother was working in New York City, the child was left with her maternal grandmother, the appellant in this case. Thereafter, husband and wife decided that the best interests of the child lay in having her adopted into a good home where she could grow up in a normal family environment. They therefore took the child from appellant's home and brought her to the Spence-Chapin Adoption Service on October 7, 1959. Shortly

thereafter, on November 9, 1959, they executed a release and surrender in order that the agency might place the child for adoption (fols. 35-38).

On November 28, 1960 a writ of habeas corpus was issued to Spence-Chapin Adoption Service (hereinafter "Spence-Chapin") commanding it to produce the infant Heather Mulhall at the Supreme Court, New York County, Special Term, Part XII thereof, on December 7, 1960 at 10:00 a.m. (fols. 28-32). The writ of habeas corpus was allowed upon the petition of the appellant, which recited in substance that she was the maternal grandmother of the infant Heather Mulhall, which infant had been placed for adoption with Spence-Chapin in October, 1959; that on or about October 15, 1959 the natural mother took the child from appellant's home and since that time had prevented appellant from caring for or seeing the infant; that appellant did not desire to see the child adopted since she was willing, able and responsible and had sufficient means to provide a home for the infant (fols. 22-26).

On December 7, 1960 appellee filed its return to the writ stating as follows: Spence-Chapin is a charitable corporation existing under the laws of New York and has qualified as an authorized adoption agency in accordance with the laws of New York State; the infant Heather Mulhall was placed in the custody of appellee for foster care on October 7, 1959 by Neil Mulhall and his wife Karen Kaye Mulhall, the natural parents of the infant; thereafter, on November 9, 1959,* the natural parents executed and delivered to respondent a Declaration and Surrender in accordance with Section 384 of the Social Welfare Law of the State of New York wherein they

* Contrary to appellant's claim (Jurisdictional Statement, p. 5) the parents did not actually execute the surrender to Spence-Chapin until more than a month after the child had been placed in its custody.

"voluntarily, unconditionally and absolutely" (fol. 44) transferred and committed the infant to the custody, control, care and management of appellee and authorized Spence-Chapin, in its discretion, to consent to the adoption of the infant without notice to them; the aforesaid Declaration and Surrender was duly recorded in the New York County Clerk's Office on December 14, 1959; no attempt has been made by the natural parents to disavow the Declaration and Surrender since its execution on November 9, 1959; on or about March 15, 1960, after approximately twenty-two weeks of foster care arranged by appellee, the infant was placed for adoption with adoptive parents where said infant resided at the time of the filing of the return;* the infant, being three years of age, was not produced in person as commanded in the writ since such production would have endangered her physical and mental health (fols. 34-47).

It should be noted by the Court that appellant's petition for the writ of habeas corpus was made more than one year after the infant had been placed with Spence-Chapin.

On December 7, 1960 the first hearing on the writ was held before Hon. Louis J. Capozzoli in Special Term, Part XII, of the Supreme Court, New York County, at which time appellee filed its return.

After a general discussion of the factual issues with the parties, the Court, with the acquiescence and consent of appellant (fol. 70), directed the Family Counselling Unit of the Supreme Court to undertake an investigation with respect to the circumstances surrounding the execution of the Declaration and Surrender by the natural

* For the information of the Court, a final order of adoption in accordance with the laws of the State of New York was entered with respect to the child Heather Mulhall in February, 1961, subsequent to the entry of Justice Gold's order dismissing the writ herein.

parents (fols. 55, 71-2). Accordingly, the Court adjourned the hearing *sine die* to await the completion of the investigation (fol. 81). At the same time the Court strenuously recommended to appellant that she retain counsel to represent her in the proceeding (fols. 51-2, 75).

The matter thereafter appeared on the calendar in Special Term, Part XII, for January 18, 1961, Justice Samuel Gold presiding. At that time appellant requested a further extension of time and the hearing was then set down for January 24, 1961. On the latter date, the proceeding was once again adjourned on the basis of a representation by counsel appearing for appellant that he had been retained only the day before (fols. 91-2, 104) and required time to become acquainted with the facts and to adequately represent appellant (fol. 95). At that time appellant's counsel filed a notice of appearance on her behalf (fol. 108). On February 2, 1961 appellant again appeared before the Court with her attorney and petitioned the Court through other counsel for still another adjournment so that such other counsel, who had been consulted by appellant by telephone on the previous evening, could return from vacation and review the case to determine whether to undertake appellant's cause (fols. 84-5, 89). Justifiably impatient with this continuing pattern of delay, the Court, on February 2, 1961, denied the application for a further adjournment and directed appellant to proceed with her evidence (fol. 86, 98).

After a hearing in which appellant's testimony was offered in support of her petition (fols. 110-147), the Court found against appellant, dismissed the petition, and an order to this effect was entered in the New York County Clerk's Office on the same day (fols. 16-18). On

March 1, 1961 appellant in her own name served a Notice of Appeal from this order (fols. 4-8).*

Thereafter, by order to show cause, appellant moved for a rehearing of the proceeding and for other relief through an attorney, annexing affidavits setting forth many new and additional facts. This motion was denied on April 19, 1961 (fol. 21). On April 24, 1961 appellant served a Notice of Appeal from the order denying her motion for a rehearing and other relief (fols. 10-14).

On December 15, 1961 the Appellate Division, First Department, unanimously affirmed both orders of the lower court without opinion (fols. 316-321).

Thereafter, on February 21, 1963 the Court of Appeals of the State of New York affirmed the orders below, once again unanimously and without opinion.

All of the proceedings in the appellate courts, except for the present appeal, were conducted by legal counsel representing appellant.

After appellant had filed her Notice of Appeal to this Court, she moved in the New York Court of Appeals to amend the remittitur "to show that a question under the Federal Constitution of the United States was presented and necessarily passed on." On July 12, 1963 the Court of Appeals denied this motion.

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* Appellant complains on p. 13 of her Jurisdictional Statement that the hearing before Justice Gold was a "closed hearing". The truth of the matter is that the court merely acceded to appellee's request that the press be barred inasmuch as there had been some unfortunate publicity after the first hearing on December 7, 1960 which appellee did not believe was in the child's best interests (fols. 98-9).

ARGUMENT

POINT I

There is no substantial question presented for review in this case.

The relief appellant is seeking in this Court appears to be as follows: to upset the order of adoption now almost three years old; to vacate the surrender and release by the natural parents to respondent which was duly executed in accordance with the laws of the State of New York; and to have the child uprooted from her home with her adoptive parents with whom she has resided for close to four years.

Appellee's position that there is no substantial question in this case rests in part upon the following undisputed facts:

> (1) Since its execution in November, 1959 neither of the natural parents has ever questioned the validity of the surrender and release nor expressed any desire to change the status quo.
>
> (2) The courts below, after full judicial review, unanimously found no merit in appellant's position.
>
> (3) Appellant's motion in the New York Court of Appeals to amend the remittitur to state that a Federal question was presented and necessarily passed on was denied.

(a) The surrender of the infant to respondent for adoption more than four years ago has never been questioned by either of the natural parents.

In the instant case no challenge has been made by the natural parents of the infant to the validity of the surrender, although the document was executed almost four

years ago (fol. 37) and the infant has been with her adoptive parents since March 15, 1960 (fol. 38). The challenge here is made by the maternal grandmother of the infant who originally in her petition candidly asserted the true factual predicate for commencing this proceeding. She complained merely that the infant had been taken from her by the natural mother and placed with appellee for adoption; that she had been unable to see or communicate with the child; and that she had no desire to see the child adopted and was willing and able to provide the infant with a suitable home (fols. 23-4). The petition contained no allegation of the mother's mental incompetency, abandonment by the natural father or the alleged illegality of appellee's acceptance and placement of the infant for adoption. These arguments were developed later by the appellant as and when it appeared that desperate measures were necessary in order to attempt to overcome the validity and effectiveness of the voluntary surrender of the infant by its natural parents.

To conclude that the mother of the infant was so unsound of mind as to be incapable of understanding the nature of the surrender of her child and that the experienced staff of Spence-Chapin, who dealt intimately on several occasions with the child's mother, had no inkling of the mother's insanity when they accepted the surrender, is wholly unrealistic.

The claim that the child's father had abandoned her is entirely negated by the uncontradicted evidence in the record that the father asserted the right to his child as against the appellant in October 1959 (fol. 132) and thereafter was a party to the surrender transferring custody of the infant to appellee.

(b) Appellant was given ample opportunity to retain counsel in the lower court.

Appellant's present complaint of lack of counsel, which was urged before both the Appellate Division and the New York Court of Appeals, is easily refuted by a factual analysis of the proceeding below.

The writ of habeas corpus was first returnable on December 7, 1960 (fol. 29). At that time the court adjourned the proceeding pending its receipt of a report from its social investigative agency (fol. 81) and strenuously recommended to appellant that she retain counsel (fols. 51-2, 75). On January 18, 1961 the writ was again made returnable, at which time appellant appeared in person and requested a further adjournment in order to permit the issuance and service of subpoenas. The matter was accordingly adjourned to January 24, 1961. On the latter date appellant appeared by counsel, who filed a notice of appearance on her behalf (fol. 108), and upon his representation to the court that he required additional time to prepare for the hearing it was adjourned to February 2, 1961 (fols. 94-5). On February 2, 1961, although counsel who had filed a notice of appearance on her behalf was present (fol. 84), an application was made by other counsel for a further adjournment so that still a third attorney, who had been consulted by appellant on the eve of the hearing (fols. 89, 141), would have the opportunity to return from vacation in Florida to consider whether to undertake appellant's representation (fols. 84-5). Appellant in her own name had issued eight subpoenas for the production of documents returnable at the hearing on February 2, 1961 (fol. 99). Upon these facts, the court properly directed that the parties proceed (fols. 86, 98).

From the record, therefore, it is clear that appellant had from October 7, 1959, the date the child was returned to the custody of her natural parents (fols. 24, 36), or at least from November 28, 1960 (the date of the issuance of the writ of habeas corpus), to obtain counsel to represent her in the proceeding. It is also clear that she was constantly advised by the court in the early stages of the proceeding to retain counsel (fols. 51-2, 75) and that she took no steps to do so until January 23, 1961, the evening before the matter was set for hearing (fols. 90-1). This attorney was subsequently discharged by appellant on February 2, 1961, the day the final hearing was held before Justice Gold. Indeed it does not appear that appellant retained counsel again until after March 1, 1961, at which time she served in her own name a notice of appeal from Justice Gold's order of February 2, 1961 (fols. 7, 288). Obviously the appellant, who chose to commence the proceeding in her own name, had adequate opportunity to obtain counsel of her choice sufficiently in advance of the hearing to insure that she would be properly represented. No valid claim can be made therefore that appellant was denied the right to counsel.

Appellant further complains that she did not receive a fair hearing below because of certain rulings made by the lower court.

Any judgment concerning the validity of appellant's arguments in these respects can only be made upon consideration of (1) the interests the court is required to protect in a custody proceeding, and (2) all the facts in the record, including the opportunity of the court below to observe the demeanor of appellant through all previous appearances in the matter.

As to the question of the interests to be protected in this proceeding it is clear that, inasmuch as the welfare

of an infant was involved, the sole duty of the court below, as *parens patriae,* was to protect her rights and interests. *New York Foundling Hospital* v. *Gatti,* 203 U. S. 429 (1906); *People ex rel. Riesner* v. *N. Y. Nursery and Child's Hospital,* 230 N. Y. 119 (1920).

As stated by this Court in the *Gatti* case:

> "It was in the exercise of this jurisdiction as *parens patriae* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements. Such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. • • •" 203 U. S. at 439.

Thus it is clear that appellant, as the petitioner in a custody proceeding, represented no protectible interest and that the sole issues before the court below were (a) whether appellee had a lawful and proper right to the custody of the child, and, if so, (b) whether such custody was consistent with the welfare of the child.

Appellant, in her role as the petitioner in a custody proceeding, therefore, unlike that of a litigant in a civil case or a defendant in a criminal action serves the sole function of directing the court's attention to facts which might bear adversely upon a child's welfare. Once this privilege has been afforded, however, such an individual is entitled to no more of a hearing than that which the court, in its discretion, deems necessary to protect the child's best interests.

In this respect the record reveals that the court below scrupulously fulfilled its obligation to protect the infant, to the point of invoking its social investigative arm, with appellant's consent, to make an investigation and report on the welfare of the child and the circumstances of her surrender by her parents. This, although the child had been surrendered to an authorized agency by a duly executed surrender. After completing this investigation, the court went still further in its effort to explore all facets of this writ and permitted appellant the opportunity to present testimony. In the light of the foregoing circumstances no valid claim of unfairness can be made.

Since the prime interest of the court was the welfare of the child and inasmuch as the evidence established a proper basis for the child's custody being reposed in appellee and a total lack of merit in appellant's position, the court below, in the sound exercise of its discretion, "after hearing and seeing the [appellant]" determined that the petition should be dismissed on the grounds that "there is no basis for this petition * * *" (fol. 143). The exercise of that discretion should not be disturbed.

(c) The failure of the New York Court of Appeals to amend the remittitur weighs heavily against appellant.

It is the traditional practice of the New York Court of Appeals, when there is any doubt whether it necessarily passed on a federal question, to amend its remittitur to so state. Its procedure in this respect has often been recognized by this Court. *Lynch* v. *New York*, 293 U. S. 52 (1934).

Appellee respectfully submits that the only fair inference to be drawn from its present failure to so amend the remittitur is that no federal question was presented

and passed upon and that there were adequate state grounds for affirmance.

Rule 15(1)(d) of this Court places the burden upon appellant to show the manner in which the federal questions presented "* * * were passed upon by the [state] court; * * *" The jurisdictional statement presented to this Court completely fails to carry this burden.

POINT II

The present appeal does not satisfy the requirements of 28 U.S.C. §1257(2).

Appellant claims that the jurisdiction of this Court rests on 28 U.S.C. §1257(2). That section provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The gist of appellant's complaint, however, has never been that the relevant provisions of the New York statutes are invalid, but simply that they were improperly applied in this case. The New York statutory provisions require "when practicable" that a child be placed with adoptive parents of his or her religion. Appellant's claim is that the child, having been born of a mother who herself was born into a Jewish family, is of the Jewish

religion. This claim is made entirely without any knowledge of what the actual religion of the parents was, if indeed they espoused any religion, at the time they surrendered the infant to appellee. In this case, it has been stated that the mother was a nonpracticing Jew, the father a nonpracticing Roman Catholic and that their marriage was solemnized in a Unitarian church. Under such circumstances, the child's religion was not clearly determinable without resort to conflicting bodies of ecclesiastical law. Accordingly, it may be assumed that the court whose duty it was to pass upon the question of whether the moral and spiritual welfare of the child would be promoted by granting the final order of adoption exercised the discretion conferred upon it by the New York statutes. It is the exercise of this discretion which appellant challenges, rather than the constitutionality of the statute which authorized the exercise of that discretion.

It cannot be too strongly emphasized that appellant's position has always been in favor of the validity of the religious provisions in these statutes.

It has only been in this Court that she has attempted to frame her questions in accord with what she considers the proper jurisdictional formula, and even now she argues that the New York statutes have been violated rather than that they are unconstitutional, since she expressly claims that

> "The orders appealed from * * * are contrary to the express provisions of the numerous pertinent statutes of the State of New York * * *." (Jurisdictional Statement, p. 5)

The entire Jurisdictional Statement is really a claim of denial of individual due process rights. In response to this argument, it is appellee's contention that no substantial question is presented for review by this Court. (See Point I, *supra.*)

Conclusion

It is submitted that the welfare of the child, now almost six years of age, surrendered to appellee more than four years ago by both her natural parents, neither of whom have since attacked the surrender, would be seriously affected if appellant is permitted to prolong this fruitless litigation. Appellee respectfully requests that the within appeal be dismissed.

Respectfully submitted,

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